Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 10, 1993

Ms. Cathy Cunningham
Senior Assistant City Attorney
City of Irving
P. O. Box 152288
Irving, Texas 75015-2288

OR93-512

Dear Ms. Cunningham:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 20688.

The City of Irving (the "city") received two open records requests for the personnel files of and records of the internal affairs investigations pertaining to two named police officers who were terminated from the police force. You state that the city has released many of the records from the former officers' personnel files but seeks to withhold some of the information from those records pursuant to section 3(a)(2), which protects public employees' common law right of privacy. The test for section 3(a)(2) protection is the same as that for information protected by common-law privacy under section 3(a)(1): to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

This office generally agrees that the personnel file information that you have marked comes under the protection of common-law privacy. *See generally* Open Records Decision No. 600 (1992). We note, however, that the marital status of public employees is not protected by common-law privacy. *See* Open Records Decision No. 455 (1987) at 8-9. We also believe that the extent to which applicants with the police department have indicated they have or have not been involved with "subversive organizations" is of legitimate public interest; consequently, those portions of the job applications indicating such do not come under the protection of section 3(a)(2) and therefore must be released. Finally, education records that individuals submit to a governmental body during the application process are not protected by common-law privacy; the city therefore must

release this type of information.[1] *Cf.* Open Records Decision No. 215 (1978) (college transcripts of licensees).

You next seek to withhold records contained in the two former officers' civil service files. Section 143.089(f) of the Local Government Code, which governs the public release of civil service personnel files, provides:

> The director [of the police officers' civil service] or the director's designee may not release any information contained in a . . . police officer's personnel file without first obtaining the person's written permission, *unless the release of the information is required by law*. (Emphasis added.)

This section prohibits the release of information in a police officer's civil service file unless the police officer authorizes the release in writing or the disclosure of the record is required by the Open Records Act or other law. Open Records Decision No. 562 (1990) at 5. Although one of the officers in question has informed this office that he does not authorize the release of his records, this office must nevertheless determine whether the records are required to be disclosed under the Open Records Act.

You contend that the officers' civil service files come under the protection of sections 3(a)(1) and 3(a)(3) of the Open Records Act. You apparently contend that section 3(a)(3) excepts this material from required disclosure because the officers in question are currently challenging their terminations pursuant to the arbitration proceedings established under chapter 143 of the Local Government Code.

To secure the protection of section 3(a)(3), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision Nos. 588 (1991); 452 (1986). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision Nos. 437 (1986); 331, 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

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[1]1. Student's educational transcripts constitute confidential "education records" for purposes of sections 3(a)(14) and 14(e) of the Open Records Act only when those records are held by an "educational agency." Where, as here, such records are held by a city, these types of records are generally not protected under the Open Records Act. *See* Open Records Decision No. 390 (1983). *But see* Open Records Decision No. 528 (1989) (portions of professional public school employees' college transcripts confidential under section 3(a)(2)).

In this instance, this office need not determine whether the arbitration proceedings constitute "litigation" for purposes of section 3(a)(3) or if litigation is otherwise "reasonably anticipated" at this time. Absent special circumstances, once access to information has been obtained by all parties to the litigation, no section 3(a)(3) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). We note section 143.089(e) of the Local Government Code provides in part that the officers are "entitled, on request, to a copy of any letter, memorandum, or document placed in" their respective files. Because section 143.089(e) provides the officers access to the information, there is no justification for now withholding that information from the requestor pursuant to section 3(a)(3).

Although you do not explain your basis for raising section 3(a)(1) with regard to these records, we assume you intend to invoke the protection of the officers' privacy interests. Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). As noted above, common-law privacy protects information if it contains highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information is of no legitimate concern to the public. *Hubert, supra,* at 550.

However, the scope of common-law privacy, especially with regard to public employees, is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The information at issue directly pertains to the former officers' moral character and official actions while serving as public servants, and as such cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986). We have marked two small portions of one of the records, that implicates the privacy interests of third parties, which the city must withhold; the city must release all remaining portions of the civil service files, including the multipage letters to the Civil Serivce Commission dated May 25, 1993, which detail the reasons for the termination of the officers.

You also contend that the city must withhold photographs of the former officers pursuant to section 3(a)(19),[2] which protects

> photographs that depict a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commis-

[2]Although you actually cited in your brief section 3(a)(10) to protect the photographs, we construe your argument to raise section 3(a)(19). Section 3(a)(10) protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision."

sioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer *unless*:

* * * *

(B) *the officer is a party in a fire or police civil service hearing or a case in arbitration.* (Emphasis added.)

In this instance, both of the officers in question have become parties to arbitration proceedings. Accordingly, section 3(a)(19) does not protect, and the city therefore must release, the officers' photographs.

Finally, we address whether the city must release the records of the internal affairs investigations, which are not a part of the civil service file. Citing *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ requested), you contend that these records are made confidential under section 143.089(g) of the Local Government Code. Because the question as to whether the confidentiality provision of section 143.089(g) encompasses records of internal affairs investigations is currently pending before the Texas Supreme Court, it would be inappropriate for this office to opine on this aspect of your request at this time. At this point it appears that the outcome of the case before the supreme court will determine the resolution of your claim under section 143.089(g) and will necessarily moot any decision this office might reach regarding the application of this provision. For these reasons, we are closing the file as to this aspect of your request and are returning the documents you submitted for our inspection. We advise that the city await the decision of the supreme court in this case to determine whether the requested information is protected under section 143.089(g). If the city requires further advice following the outcome of this case, we will be prepared to assist at that time.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,

William Walker
Assistant Attorney General
Open Government Section

WW/RWP/jmn

Ref.: ID# 20688

ID# 20689
ID# 20999
ID# 21234
ID# 21235
ID# 21257
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Enclosures: Marked documents

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